

**CONSTITUTION OF KENYA REVIEW COMMISSION
(CKRC)**

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

Verbatim Report of

**THE PLENARY PROCEEDINGS HELD AT THE PLENARY HALL,
BOMAS OF KENYA.**

ON

05.02.2004

CONSTITUTION OF KENYA REVIEW COMMISSION

NCC - PLENARY PROCEEDINGS, NEGOTIATION SKILLS AND CONSENSUS BUILDING, HELD AT THE PLENARY HALL, BOMAS OF KENYA ON 05.02.2004.

Present:

1. Yash Pal Ghai - Chairman of the Commission
2. PLO Lumumba - Secretary
3. Koitamet Ole Kina - Vice Chair of the Conference

Secretariat staff in attendance:

1. Walinywa Wabwoba - Asst. Programme Officer
2. Anne Kiama - Verbatim Recorder
3. Parliamentary Clerk.

Speakers:

- 1) Makumi Mwangiri Director, Institute of Diplomacy and International Studies-University of Nairobi.
- 2) Rose Arungu Olende Executive Director Maendeleo ya Wanawake Organization, Delegate Number 502.

In attendance:

- 1) Ruth N. Kibiti Maendeleo ya Wanawake Organization (Women Organization Representative on Steering Committee). Delegate number 511.
- 2) Oduol Ong'wen NGOs Representative, Delegate number 459.

The meeting started at 9.25 a.m. with Prof. Yash Pal Ghai in chair.

Prof. Yash Pal Ghai: Okay, Njue, please say prayers for us, and I ask you to stand up for prayers please. Arch Bishop Njue, I am requesting you to say prayers for us today.

Hon. Delegate John Njue: In the name of the Father and of the Son and of the Holy Spirit, Amen. God our father, we thank you for sharing your own life with us, creating us in your own image and likeness. And we thank you for making us citizens of this beloved country, Kenya. As you well know, we have come together in order to review our Constitution. We still ask you to guide us with the light of your Holy Spirit, that whatever we say, whatever we deliberate on may be able to bring us to a consensus so that at the end of the day this country may be able to have Constitution that will guide our people for generations to come. We ask you Lord to touch the hearts of all of us, that we may be able to understand one another and be ready to understand the view points of one another so that reconciled, we can walk in peace and be able to bring forth a good Constitution. We trust in your providence, we trust in your being with us.

We ask you to bless all those who are now in Mombasa making the draft; we ask you to bless all those who are involved in reconciliation, that Lord, this may be able to bring us peace in this Bomas and the whole country. We ask you this through Christ our Lord, Amen.

(The National Anthem played).

Prof. Yash Pal Ghai: Thank you. I believe there is no one today to take the Oath. Is Mr. Davis Nakitare here, the new MP, the new Delegate to the Conference? If he is, would he please come forward to take the Oath of office. He is not here, then we can proceed to the next item, which is Communication from the Chairman--

P. L. O. Lumumba: No, he is here.

Prof. Yash Pal Ghai: Is he here? Mr. Nakitare, I welcome you to this National Conference, and before you can take part in our proceedings, you have to swear the Oath. Now, are you happy to swear the Oath or would you like to affirm?

Hon. Delegate Davis Nakitare: I, Honourable Captain Davis Wafula Nakitare, MP, Saboti Constituency, being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly swear that I will be faithful and fully, impartially, and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment, without fear, favour, bias, affection, ill will, or prejudice to the end that in the exercise of functions and powers as such Delegate, I shall at all times be guided by the national interest. So, help me God (*Clapping*).

Prof. Yash Pal Ghai: Thank you very much. You will please sign that Oath and I now formally welcome you to membership of this August body and look forward to your contributions, thank you.

Honourable Delegates, I am glad to see you here again. I would like to repeat the part of the Oath, which you all have sworn and which Mr. Nakitare has just sworn, and it is that we have promised to God that to the best of our ability, we shall discharge the trust and perform the functions in exercising the powers devolving upon us, by virtue of being a Delegate to this national body, without fear, favour, bias, affection, ill will or prejudice, and to the end that in the exercise of the functions and powers as a Delegate, we shall at all times, **we shall at all times** be guided by the national interest.

I want to remind you of this part of our Oath because the Conference is entering upon the most critical phase of its work, when all the months of hard work that we have been doing reach a culmination point.

We have some of our Delegates in Mombasa, who are reviewing the work of the Committees, harmonizing the recommendations of the different of the different Committees, and preparing the final report for presentation to the Committee of the whole Conference. That is a very critical task and we wish all the Delegates and the Commissioners who are in Mombasa good luck in their work.

We still have people who are trying to throw obstacles in our way; I think the best way to deal with those obstacles is to focus all attention on the work that remains to be done. As a

Constitutional lawyer and as a person who has been operating through the Constitution of Kenya Review Act for now nearly, for more than three years, or forty months, to be precise, I can assure you that there is nothing wrong with the Review Act that prevents us from finishing the work and Parliament from adopting the Constitution (*Clapping*). So please don't be deterred and don't be worried by what Mr. Muite have said, we are perfectly entitled and indeed we are required to complete the task in accordance with the Review Act, and when the Draft that you will have adopted has been approved by the Conference, we shall on the floor of this House hand the Draft to the Attorney General, whose responsibilities are clearly spelled out in the Review Act; he has to gazette the Draft within seven days of receiving it, within another seven days he has to table the document before Parliament and then Parliament has to approve the document within a fortnight; and I believe that all MPs who are participating in our work realize this and in the spirit of the Review Act and the wishes of the people of this country, they will proceed to adopt that Constitution.

The challenge for us at this stage (*Clapping*) is to do a task to the best of our ability, keeping the national interest uppermost in our minds. We must make sure that we produce a document that we can all, together and individually, be proud of because history will judge us, all of us, by the product of our deliberations. We still have time to refine our recommendations and our text. We have also as you know, set up a Committee or a group, it is not a formal Committee, it is a group to build consensus and I believe yesterday, after the Debate, you endorsed that this group has been put together in order to establish the widest consensus possible. You know some of our enemies have been saying that we are not listening to some others, that we have formed our mind already. We want to show them that we have kept the door open as indeed we should, to all Delegates and indeed to all stakeholders.

Our intention is to produce a document that enjoys the widest measure of support in the National Conference and in the Country as a whole. I a glad to say that Bishop Sulumeti, who has already played a very distinguished record role in the whole process leading to this Review process, in the oldest in Safari Park, in Bomas and helped to build a consensus at that very critical moment in our history, has agreed to be appointed as a Chief Mediator (*Clapping*). He has always been a great force for bringing people together and his training as priest and his own dedication to the national interest has meant that he has always played a very positive role and I certainly

appreciate very much that role (*Clapping*). I had the opportunity to sit at the meeting of the consensus-building group yesterday, which he chaired, and I am glad to say that the spirit was extremely positive. There were very cordial exchanges and I was in fact very pleased that at long last we are about to build a consensus among all the key stakeholders (*Clapping*).

The meeting yesterday was very positive and we reached a consensus among ourselves on a number of issues; the work will have to continue for another couple of days, and I am confident that by that time, there will be a consensus on most issues. Of course, this consensus will have to come back to this body because you are the final decision makers. The task of this group was to facilitate your deliberations, our work together. The recommendations of this body will be fed to the Committees and they have a chance to discuss it and to see if they want to include that in their Report. My own hope is that when we have the Reports of the Committees, this will be reflecting a consensus and the task of the Plenary will be facilitated by the applied consensus.

The Review Act as you know, requires us to reach decisions by consensus, and only to proceed to vote if it cannot reach a consensus. It is my profound hope that we will be able to reach a consensus by accommodating the views of all the people and I want to thank the members of the group who are meeting, working hard to develop a consensus. The meetings are being held outside Bomas purely for physical reasons, this room is being used for Plenary, we do not really have a proper adequate room for that Committee, but it is, I can assure you, part of Bomas. The Steering Committee had established on an informal basis, that group, which it reports to the Steering Committee and through the Steering Committee, to this Plenary. Similarly, the work going on in Mombasa, even though it is not physically in the Bomas of Kenya, it is an extension of this body, because it is working on behalf of the National Constitutional Conference, and so, Bomas is now working on different fronts as we pull everything together and when we meet next week, everybody will be here and Bomas, the National Conference, will then begin to make decisions which will lead to the final Constitution. So, you remain the key decision makers to the very end of our process.

So, with that I want to suggest that (*Pause*). So, what I would like to propose is that we proceed with the work this morning. During tea break, I would request the District representatives and the Provincial coordinators to meet with their colleagues and if you have any further questions about

the work in Mombasa or the work of the Consensus Building Group, they will be able to give you further explanation. But for the time being, I think we should proceed with the programme for today and the Secretary will let us know what it is; and at tea break the different groups will meet with their coordinators for further short briefing on the two processes that are proceeding in parallel with your own meetings.

PLO Lumumba: Thank you very much, Mr. Chairman. Two things, during the tea break we have assigned the meeting sites in the following manner: those from Nairobi will meet in the Judiciary tent, those from Central will meet in the Executive tent. I hope you will note down. Those from Nyanza will meet in the Representation tent, those from Rift Valley will meet in the Devolution tent, those from Eastern will meet in the Legislature tent, those from Coast province will meet in the Finance tent, those from North Eastern will meet in the Culture tent and those from Western, in the Land tent.

The Political Parties will meet in the Commissions tent, the Religious group will meet in the dining room, in a corner which we will set, the NGOs will meet in the Registration tent number one, the first tent as you enter on your right; the Professionals will meet in the Press tent as you walk to the dining area, *nyama choma*, the Women's Organizations will meet in the Steering tent and the Trade Unions, in the staff tent. This is going to be typed in a short while and will be posted on the notice board.

The second programme for the day, we have with us this morning, a lady and a gentleman who will take us through some of the finer points of negotiation and consensus building. The Chairman will make opening remarks on his experience in different parts of the world and hopefully, the most recent in Afghanistan, which has produced a Constitution, which is now operational (**Clapping**). And my good friend Dr. Mwangi, who is the head of the School of Diplomacy at the University of Nairobi, will make a presentation, immediately after that, Rose Arungu Olende, who worked at the UN in New York for a long time and is therefore as good as they come in matters of negotiation at the international level, will make the presentation. You will see ladies, that we are gender sensitive, Mwangi the man, Arungu Olende the lady (**Clapping**). With that, the Chairman will make opening remarks and I now formally invite the presenters to come to the front. Thank you, ladies and gentlemen, have a good session.

Prof. Yash Pal Ghai: Honourable Delegates, I wasn't aware that I was going to make a formal presentation, but I will certainly like to share with you certain thoughts. I will be brief because we have two experts to talk to us on this.

The first point I would like to make is that it is extremely important in a process like the one we are engaged on, the process of making a Constitution, that we should aim for the highest degree of consensus. A Constitution is different from other kinds of laws; other kinds of laws can often be made by a majority, and we normally say that if there is a majority for a particular position in a democratic society, we should accept that as the will of the people and obey laws that result from that process. But a Constitution is a very different kind of document from an ordinary Act. A Constitution, is first and foremost, a compact among the people of a country. It is a contract, it is an agreement among all the people as to the basis on which they have agreed to live together and to conduct their affairs.

So, it is an instrument that sets the basic decision-making processes for the country, and it is a document which includes, which contains the principle values by which we want to live. You will notice that our Constitution Draft has both these things, it sets out the values by which we want to live, the moral –ethical standards that we feel should govern our leaders and indeed all of the people; and it sets out a number of institutions that have the task of making decisions for the nation and for the implementation of these decisions. In my view, a Constitution should ensure that all the people of the country are agreed on these two fundamental questions, that of Values and Principles, and that of institutions.

It is particularly important in that document that the interests and the rights of minorities are protected, because if we operate as a total system on pure majoritarianism, then these minorities are always at a disadvantage. So, they also must be secure that the Constitution will protect their fundamental interests, reflect their values and ensure their participation in the governance of the country. A country, I think, is as strong as the consensus on its Constitution. We have, I think, over the years, developed a spirit of being Kenyans, regardless of our ethnic, racial, religious, indigenous backgrounds and I think we have been offered an opportunity though the review process to strengthen that spirit of belonging to one political community.

Arch Bishop Njue said in his prayers that we are all fortunate and thank God that we are now citizens of Kenya; and I want to endorse that sentiment and say that we must use this opportunity to strengthen our spirit, our fellow feeling as Kenyans. I don't believe that we will be able to strengthen that fellow feeling unless we listen to all points of view and try to accommodate them all. Of course, it is not always possible to accommodate every single point of view. In those two circumstances, we must find a consensus, so that every group feels that it has had a fair hearing and that its views have been taken into account in the final result.

Now, this, it seems to me, can only be done if we have the spirit of give and take. You do not go into a negotiating session –consensus building- without a determination to listen to others and to try to persuade others. But you also go to these negotiation sessions with willingness to concede the points of others and to drop some of their own demands. So, I think that is absolutely crucial, and what was so encouraging for me yesterday in the Consensus Building Group was that everybody seemed to have come with that spirit to the meeting. The Review Act as you know, tries to make the process all-inclusive, so that every community, group, gender, religion is represented in Bomas; and I think the great strength of Bomas is that the entire nation is represented here.

For me, it has been a very good pleasure and a great inspiration to work with all of you, people I had not met before, perhaps in my ignorance, I didn't even know that we have so many groups, so many ethnic communities, and that it have been a real aspiration to work with so many. So, the Review Act I think did a wonderful job and insisting that the process should include everyone, the day it was strength for the Act that it required us to listen to everyone, to have this long period of public consultation that we did before we wrote a Draft as a Commission; and now the Review Act says, as you are reaching the final stages of your process, you must try to get a consensus on the document and all the issues. So, it is actually for us now in the final stages of a process is to build that consensus and my colleagues will speak to you about some of the negotiating skills that are necessary for a consensus building.

Our Secretary said that perhaps I could talk a little bit about my own experiences of consensus building and I will be happy to do so.

As you know I was involved in the Constitution making process of Afghanistan. When I was invited to participate one of the things I did was to explain to the Afghanistan Commission and the key stakeholders, including the President of the country; I took two hours to explain to them the process that we had followed in Kenya and they were extremely interested and in particular they were already interested in two aspects of our work.

One was the word ‘consultation’ that we had, because they were really afraid, given their history, given their many warlords, given there were fundamentals on all sides, they were really afraid to go to the people because they thought this may paralyze the process. And I told them that, you have to trace the people, I know you have difficulties, I know there is a lot of people with firearms, I know you have been fighting internally for a long time, but my experience in many countries, and I also advised them on Cambodia, after the terrible genocide of the Cameroon and then again there was a lot of fear, the people who would just not speak, they have been traumatized by all these killings and that the Committee would not be able to engage with the people.

Again there as in Afghanistan I was able to persuade the organizers of the Review that they have to trust the people, because my experience shows that the people are always on peace, women always on peace particularly, even men were on peace, they want good happy families, they want opportunities for the children, they want prosperity, they want security and I told the Commission and the President’s office that they really should go and talk to people and get the views and I explained our own process how despite the anxiety of some people that if they speak out they will be victimized, that eventually they were persuaded to participate and what a wonderful experience it was for all of us to have that engagement.

The second thing I said that they must work towards a consensus, that they have good organized groups, they have very bitter history of internal wars, but this was an opportunity for them to engage in a dialogue to put the past behind them and doctor a Constitution which acts for the future. Again they were already skeptical if that could happen and since they had guns they thought that reason and this cause would be able to change people’s attitudes. Anyway, they did try and they went around the Country and the guns were silenced; there was almost no killing in the period that the Commission was going around the country and talking to the people. And so

they committed themselves to trying to find a consensus and I can tell you that we worked through four or five Drafts, some informal Drafts, some formal Drafts, before they began to settle their differences; and even as the Delegates went to what they call *Lirya Jirga*, which is exactly like this body, there were still some outstanding issues because despite last minute efforts, we were not able to sort out all the differences. We narrowed them but there was still a few.

During the actual Conference, there were many informal meetings, a lot of pressure from the President, from the diplomats who of course had funded the whole process, from the U.N., they played a very important role in the process. They had an excellent Head of United Nations there Mr. Larka Ibrahim, an Algerian who had been a former Minister of Algeria and it was for me a very great honour to work with him and he was a marvelous conciliator and even as the Delegates were debating, there was out force going on behind scenes that the key ethnic leaders, warlords, religious leaders, to try to get a consensus and indeed they did get a consensus and on the last day when they were to decide, there was “no” vote, everybody said, yes, we like this document and that was a wonderful end to that particular process.

We have a much stronger sense of nationalism, we have lived in peace for not only since independence, but even before and so it should not be difficult for us to get to a consensus. We are much better placed, they can get consensus despite the much greater difficulties, surely we can get a consensus.

Consensus is developed in different forums, in different ways, I think Bomas has on the last six, seven months, since the end of April developed many understandings among the Delegates, we did not know each other before we started, we have now established good friendships, we have suspicions about fellow Delegates have gradually disappeared, they were not entirely perhaps. So, Bomas has already provided a framework within which we can now conclude our work with the consensus.

I think the Plenaries we had were very important in articulating the views of all of us, even groups, even individuals, despite what people sometimes think, we did listen to others with great respect. There were moments when there was a lot of commotion and some people may have in

fact heckled, but that was inevitable in the very beginning in a large body like this. But since then I think we have all behaved with great stability, we listened to others and we have changed our minds, as we have been able to persuade others to change their minds. Well, that is part of a negotiating process and I think we did well.

Similarly in Committees, in the Committees that I sat in, I found there was free debate, sometimes heated debate that there is nothing to be afraid of, it is a sign of a commitment that we can sometimes be very passionate and if we were not passionate, it would mean that we had perhaps not so committed to our views; but despite this passion we listened to others and we were able to get in many cases a consensus. Some decisions of the Committees had to be made on the basis of voting and I am glad to say that some Committees are saying, okay, let us revisit some of these controversial issues and see if we can get some consensus and they will be assisted by the Consensus Group and already some consensus is emerging on issues which even as late as last week, we thought would have to be taken to Plenary. Now those issues can be taken to Plenary in the form of a consensus. So, the Committees are another forum where consensus is being built and our ability to engage with others is critical in that particular task; then a consensus can also take place in informal settings. In Afghanistan as I mentioned, in Cambodia, in many other contexts, some of the most critical issues as it is all really in very small informal gatherings. Often as I think you have apprehended, I have always told you, often with groups that they cheer foot together and says no, please, now you have only one harmony, come to my office, let us sort this out so we can move forward.

So, there are many forums in which negotiations take place to get a consensus and for us the critical body, if everything else fails, it is going to be either Consensus Building Group which is very representative and on which I am glad to say, every Group, even Groups who were to criticize us as are there today and showing a spirit of compromise.

Now, it seems to me as I said earlier, it is important in negotiations for a consensus that you listen to others. I have suddenly found for myself the most important feature, at least for me it met different with personalities, is to be able to put myself in the shoes of my opponents when I am negotiating well, to try to understand what is bothering that person, not dismissing, not either trouble maker, not to say oh, I have to defeat him, but to try to understand what is going on in

his/her mind. Why is he/she assuming so obstinate to me? And only if you understand the other person's anxieties, that I think you have taken the first quiet step. So, do not dismiss what others are saying, listen to them very carefully and maybe you will see that there is some reason in that point of view too; because if you try to persuade the same person to understand you as well-- So, I think understanding is extremely critical.

The second rule I would say is that you should be willing to make concessions, because if you keep on repeating, people repeating the same points that you have been making for eight, nine months in Bomas or other places, you are not going to move forward. You only get together to negotiate if you are willing to make concessions and to accept concessions even though they may not give you all that you will be looking for. So, please keep an open mind, please see, sometimes you see it is possible that on one issue something may be very important for me as a Member of a community, or a profession, or whatever group I represent. It may not be so important for you. So, you should be willing to say okay, I realize this is very important for you, emotionally, morally, materially, whatever, but for you it is not so important, you say, fine, okay, I will be left behind that. But then the next issue may be one on which I may have strong views but it doesn't matter so much to me, regardless on how the matter may result. While as to the other person that is critical. So, then I should be able to see that and say fine, you gave me that point, then it was important to me emotionally, morally, materially, I have now realized that the laws have been reversed, this issue is important and I concede you. I think these are some of the reasons which we can show goodwill and make a progress.

The third thing I think is important is to have a master of what the issues are. So, you need to know what the Committees have decided, or what the outstanding issues are and you must know them in some details. So, you need to know exactly what is a point of contention. I have sometimes sat in certain meetings when people are talking really not about the issues abound by things around that. So, I think a good idea of what the issues are, is extremely important in negotiations.

I could give you many more examples of countries where I have been involved and I am sure many of you have been involved in many negotiations because of course, Constitutional negotiations are a little different from other kinds of negotiations, but there are many common

principles that apply to all kinds of negotiations. There are negotiations that Trade Unions do and there are many of them here, Political Parties are constantly negotiating, Women's lobby has much experience of negotiations, we have many professionals here who are professional negotiators but in the donor associations they have to negotiate. So, negotiation is nothing very strange, nothing very difficult and nothing very unique. I think all of you have experience and ability to negotiate. So, do not think this is something very different, that it is difficult and that you cannot do it. You can do it because in every day life we are contently negotiating and the experience of Bomas shows that we have a lot of experiences; a lot of people with background in bringing people together, in solving differences, we would not have reached the stage of Bomas that we have but indeed of the whole Review Process, if at every stage people had not shown reasonableness and listen to others to arrive to a consensus. So, I do not think you need a lot of lecture from negotiations or me because you all have ample experience of this and I am confident that we will put this experience to good use in the next few days as we finalize our document. So, thank you for your patience and I wish you good luck in your negotiations. Thank you. *(Clapping)*.

(Consultations at the "high" table).

Hon. Delegate Arungu Olende: Thank you, Mr. Chairman. Honourable fellow Delegates, my name is Rose Arungu Olende, Delegate 502.

I have been in Bomas with you from day one, some of you are very well known to me and you know some and me are not. I have been to the Citizenship and Bill of Rights Tent. So, I know most of the Delegates from that end very well. Fellow Delegates, speaking after Professor, I feel like there is not much I can add to what he has said because I learnt my negotiation skills from Professors like him and from very notable Diplomats in my work in the United Nations and that is for the best part of my twenty five years of working for Kenya Government and for the United Nations itself.

Fellow Delegates, as Professor Ghai has said, we all have negotiations, the skills, the art, some better than others and it is something you do in your daily lives. It is only that we tend to forget once we enter a room like this one that we have those talents. Infact when we came to Bomas of

Kenya first, we filled a form where we were asked, what are your experiences, what are your strong points, what are your talents? It is only when this issue came up, that I realized in my form I filled negotiations, I forgot about it, but I have realized that is what I have done most of my lives; and the people I have negotiated with are not different from us here. I have negotiated between countries, and countries always overwhelmed me, I said, how can I know what one wants. I do not know their people; the only person I met is the Diplomat in front of me.

Coming to Bomas of Kenya, I thought now, the negotiations will not be as difficult as what I have gone through in the United Nations. Why? I said we are one Country, we are brothers, we are sisters, some of you are my relatives, blood relatives, so I said, what could be so difficult? We all want one thing. So, to me, I did not see Bomas as insurmountable and that is why I have agreed to talk to you about the skills of negotiations and I am not going to tell you anything new, and what I say might be repeating what Professor Ghai has said. I had not talked to Professor Ghai before but U.N has taught me to write down points so that if I am asked I can say yes, it was authorized; because whatever I said had to be authorized by somebody. It is only when I go to fine round tables, small room negotiations, I negotiated within those boundaries. So, I have my text which I will read to you, and in it, I am sure you will see the points, the very fine points that Professor Ghai has outlined and which my other colleague is also going to outline. There are not many skills you need, you have them, you use them in the market place, you use them buying cows, you use them buying vegetables, you use them buying your clothes, you use them in negotiating in groups.

So, I will simply say that a negotiation is a process of conferring with others in order to reach a compromise or an agreement. That is how the concise Oxford Dictionary defines negotiations. Usually, a mediator is involved but not necessarily, it involves two groups which could be two people or a group, it is an art.

Negotiations thus involves, voicing delineating areas of disagreements of conflict in order to achieve what is acceptable to the parties concerned. It is assumed that these are reasonable people or parties. Some of the points I highlight are used/intended to help in achieving a negotiated settlement. Negotiations also involves interaction between people.

As a known Justice of the American Supreme Courts, I might be wrong because I just remembered this one said, in interactions between two people, there are actually six people involved. You as you see yourself, you as you are actually you and you as the other person perceive you; and Professor Ghai has alluded to that.

Each negotiation is as different as the people you are dealing with: Their temperaments, understanding and their desires to reach an agreement are all to be considered. Therefore, you need to ask yourself, and be prepared to understand; “What is it that the protagonist is saying”? This includes understanding the horizon you are faced with. Is it for long term or short term solution? Is the problem ethical, moral or legal in nature? Can you justify it morally, ethically or legally?

You need to be flexible at times and avoid being tied down to legalistic perspectives when the solution probably lies with the moral or ethical perspectives.

It is important to understand the real nature of the problem. If the problem is defined well, areas of commonalities will emerge. Identify these areas of commonalities and build on them. Remember that in every negotiation, you are trying to reach a common goal.

Take into consideration the concerns of the protagonist and veer the concerns to see if they really relate to the problem. This needs your impartiality self. So you must always appear to be impartial. It is only by achieving this state of being that you can also help as a mediator.

So, the negotiation could best help the process if they

- Understand the issues.
- Appreciate the points of view of the other side. Be honest – put everything (the Pertinent issues) on the table.
- Be patient. (Negotiations can take a long time).

It is important that the mediator (*where one is involved*) be unbiased. This is important for the success of the negotiations. It also generates trust and confidence in the negotiator by the

protagonists. To be a good negotiator you must be a good listener; and Professor Ghai has said that. Listen to hear what the other side is saying. Do not imagine it. You can read between the lines, but do not work on assumptions.

- In all negotiations you have to know when the deal is done so that you can stop before you spoil your gains.
- The Protagonist must be willing to give and take; and the Professor has said that.
- They must also leave room for maneuvers and compromises. In other words they should prepare ahead what they are willing to trade off or over.

The spectrum of negotiations can be wide, look at the consequences. For example, this might be way out but it is also in. Negotiations versus cooperate negotiations. In the first, like Police negotiations versus cooperate negotiations. In the first instance of Police negotiations, the consequences of not reaching an agreement might mean death of a hostage. While in the second scenarios of negotiations, it may simply mean, loss of a big account for the company. You need to weigh the consequences very carefully.

Going back to what is the concern, or real nature of the problem: For example, If the President has all powers, will he be less of a dictator or is it because she or he is your person that is why you want to give all powers and not share it out? Witness the horizon and ask yourself, is this for a short-term solution? Am I looking for a long- term one?

- If you make the protagonist understand your real, not imagined position, there will be a give and take and sometimes they call it trading of horses. In negotiations all are equal, you can answer by yes or no.
- Until you understand and appreciate the nature of the problem, you cannot find a solution.
- For negotiations to succeed there should be a symmetry of information, otherwise one side will end up having an upper hand.

- ☑ In interactions with the negotiating groups it is important to know the major negotiators, those who are calling the shots.
- ☑ The atmosphere you create for your negotiations is important, thus we talk of an enabling environment. That is why some people have gone to Nanyuki, some people are working here.
- ☑ Closeness and that is closeness in proximity like we were in our tents, and cordiality are important assets for negotiations.
- ☑ These are just some of the points that came to my mind as I thought over this issue for the last 24 hours. It is in no way intended to be an exhaustive list of points on the art of negotiations and I therefore leave the rest to my other colleague analyst. Thank you very much, for listening to me, Honourable fellow Delegates (*clapping*).

Prof. Yash Pal Ghai: Thank you, Madam Rose. That was an excellent presentation, very certain, very focused and I would like to just pick up one point that Rose made which I did not myself but I intended to-- and that is to think of the consequences and what are the consequences of failure. We all know what the consequences of the failure of this process would be. I do not need to tell you how serious, how dramatic or unfortunate the consequences could be. So, sometimes you have to settle and say, okay, I am not getting everything out of the process, I am getting quite a lot but I know that, if I do not now proceed, the consequences could be terrible. I think we need to keep that in mind all the time. In our case, a process that has gone on for more than three years, which will have cost us about three billion shillings, to take no account of enormous contributions in terms of people's time, energy, intellect, people's expectations, so the cost of the process if it fails will be extremely high, I think we need to keep that in mind all the time. So, I am going to ask the Doctor now to make a presentation, after that I would suggest we have an adjournment for tea and for your brief meetings in your tents, and then we get back here for a question and answers and further deliberations on this question.

Makumi Mwangirui: Thank you, Mr. Chairman. I teach at the University of Nairobi, where for the last four months or so, we have been involved in conflicts and some disagreement. It is not as big as the one at Bomas, but it has made me sit back and think about what we should do in order to move the process of negotiation forward, especially where people have been digging in and not wanting to listen to others. The process that you are involved in here at Bomas is a process of managing a conflict. A conflict is not a bad thing, sometimes we need to have it, but when we have it we need to be able to negotiate with each other. Always there are very many actors involved, different groups, different personalities and so on. And because we have very many actors involved in the Constitutional process for example, there are many issues that are involved in the negotiations that you are involved in. Because there are many actors also, there are very many interests and just reading the newspapers every morning one gets to understand the kinds of interests involved, the really deep interest and the need to know which ones these are. All these actors, you and others, are interacting with each other and in that interaction we need to be thinking, what are our mutual interests in this process?

In a negotiation such as this one at Bomas, which is a quite complex negotiation, we are all looking for certain outcomes. The outcomes that we would like to have are outcomes that will endure, because the Constitution that will be made at Bomas will be a Constitution not just for this year or next year, but a Constitution for generations to come. We also need outcomes that are legitimate, legitimate in the sense that the outcomes took care of everybody's interest to the greatest extent possible. And so whatever we do in the negotiation, I think that we need to be guided by a vision of what outcome we want to secure, a short-term outcome or a long-term outcome. There are also some different outcomes that are possible, we could have a settlement, and I think this has tended to be going on in the Constitutional Conference. A settlement involves power, and power means bargaining and sometimes a negotiation based on power does not help us to secure an outcome that will endure. So, we need to think about resolution, because a resolution is something that we have mutually agreed on, something that we find to be legitimate, and therefore something that will be there forever or for a very, very long time. It takes a long time to reach a resolution, but it takes patience as well, but eventually if it can be reached it is maybe the best possible outcome. When we negotiate in a complex negotiation like this, I think we should also ask ourselves, what is it that I want for my neighbour? Do I want a situation where I win everything and my neighbour loses everything? Or do we want a situation

where all of us win, all of us emerge as winners? So as we negotiate I think we need to keep in mind the need to have a “win-win” situation.

Whenever we have disagreements, there are different ways by which we can try to manage these disagreements. One way is negotiation, another way is mediation; negotiation and mediation are less formal methods of managing disputes and disagreements. They are preferable for example, when going to court and when going to arbitration, because when you go to court and when you go to arbitration, somebody makes the decision for you. When you negotiate, when you are involved in mediation, you make the decision for yourself and so we need to insist on continuing with the process of negotiation. Bomas of course is a process of negotiation that has now been going on for some time, it is a complex negotiation and it should be because the Constitution is an extremely complex and important document. So, as we negotiate we need to ask ourselves, what relationships do we want to build for the future Kenya? And I think the only answer can be, we want a future where everyone’s interests have been secured.

Sometimes, and this is quite evident from the Bomas process, after people begin to negotiate they fail to agree on some issues. In other words, they reach a deadlock. There is nothing wrong with reaching a deadlock, because a deadlock means that there has been a process of negotiation going on. But of course, unless that deadlock is broken, then the whole negotiation will collapse. So we are interested in building a process through which we can break that deadlock, and this is what we mean by Building Consensus. If we build consensus we will be breaking a deadlock and therefore, we will be helping our process of negotiation to continue. But sometimes the people engaged in negotiations such as you, are unable to break that deadlock and so, they need some help. That help comes from the negotiators who have reached a deadlock agreeing to bring in a third party, which we call a Mediator or a Facilitator. The job of the mediator –the job of the facilitator is not to reach decision on behalf of the negotiators, the job of the mediator or the facilitator is to help the negotiators to continue with the process of negotiations that had reached a deadlock. So, mediation is related to negotiation, it is a continuation of negotiation but in presence of a third party.

Mediators and facilitators of course cannot be imposed, because the process of negotiation, the process of mediation is a voluntary process in which people and issues are not imposed on the

negotiators. But in order to continue usefully with the process of negotiating our way out of a deadlock, we need to have some strategies, some strategies that can help push that process further. There are many strategies that can be used, but I would suggest the following:

First, we need to see the conflicts that we are involved in as a problem that we need to solve mutually. We need to have this psychological change of perception, see it as a problem that belongs to all of us and that we must work together to resolve. This is a process of problem solving and the Bomas process is about solving the mutual problems of Kenyans, not just of Delegates.

The second thing, is that we have a lot of issues on the table, those issues need to be broken down a little. Some of those issues are more important than others; some of those issues are more complex than others. Indeed some of those issues are non-issues, non-issues means that they are issues, which have been introduced in order to complicate and even kill the process. So, in this negotiations we need to first sort out these issues, know which issue represents what and we must agree, of all these issues which are the really important issues. Once we agree which are the really important issues, then I think we should spend our time and our energy negotiating those really important issues.

Thirdly, I think we all need to understand that we are involved in a process; negotiation and mediation is a process. It is a social process, it is a political process, it is also a legal process and certainly it is an economic process because it has serious economic implications. A process is dynamic, a process is always changing and this is as it should be. Bomas is a process; it is a process that involves not just the Delegates, but all Kenyans. Bomas is a process because it is negotiating the future, and in negotiating the future we need to be very, very clear without cheating ourselves, what are the really important issues to help us secure the future for Kenya that we want.

The fourth thing is that the process we are engaged in, the process of negotiation, involves very many pressures, and Bomas, at least what the newspapers say about Bomas, has brought out the different pressures that are involved. I think we should understand these and their basis in order to help ourselves to negotiate out of the problems when we reach them. People negotiating must

be able to withstand all these different pressures; there are pressures from fellow negotiators, which is as it always will be. More than this, there are pressures from our different constituents, because we are here in Bomas negotiating on behalf of our constituents, and our constituents have certain expectations, and those expectations can put in a little pressure on us. So, we need to understand who are our constituents and we should understand what the interests of our constituents are. If we forget who our constituents are, if we forget the interests of our constituents, then we will run into a problem, a very serious problem. In particular we will run the risk of encountering a problem of re-entry, re-entry means that you can negotiate, you can reach a conclusion, you can produce a document like a Constitution or a treaty, whatever it is, and then the constituents reject it, they refuse to accept it because they may think that you did not do precisely what they wanted you to do on their behalf.

The problem of re-entry is a very common problem, on our continent people are always negotiating peace and when they go back, the peace breaks down and they start fighting again because they did not consult, they did not take into account the interests of their constituents that they were negotiating about in the first place. So, uppermost in our minds should be the question of how we can avoid the problem of re-entry, I think we can do this by focusing on the really important issues. Secondly, we must constantly remember our constituents and keep on consulting them. Thirdly, we must know the outcomes that we want, and lastly, we must be patient if this process takes a long time. Being patient means, amongst other things, that you cannot afford to walk out of negotiations, you need to be in negotiations so that you can state your case, so that you can appreciate the other's point of view, so that you can reach a mutual and a mutually satisfactory outcome. That in my view is what consensus building and negotiation is about, it is about people and really that is the bottom line. I thank you for listening to me. (*Clapping*).

Prof. Yash Pal Ghai: Well, thank you very much, for those very clear exposition. I think perhaps now we are read to adjourn for tea and to meet in your tents, I will suggest perhaps you should try to get back here by 11:30 am., so we can continue our deliberations on the negotiating process. Thank you very much.

The meeting adjourned for tea break at 10:45 am.

